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No. 96-1684

In The

Supreme Court of the United States

October Term, 1996

LAWRENCE B. MUCKLOW,

Petitioner,

vs.

SHERRY E. FARROW HARVEY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Fourth District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

Petitioner Lawrence B. Mucklow is the only appellant filing with this Court a Petition for Writ of Certiorari.[1]

Appellant Vivienne Lynn Kirk filed a separate appeal to the California appellate court in this action. Ms. Kirk did not file a separate Petition for Writ of Certiorari nor did she join in the present petition. Pursuant to Supreme Court Rule 13.1, Kirk's failure to file within the 90-day limit imposed and failure to comply with 28 U.S.C. § 2101(c) conclusively precludes her from further appeal.

Respondents Sherry E. Farrow Harvey, Thomas O. Farrow and James E. Farrow have been determined by the California Court of Appeal to be the decedent's (Mrs. Edna Clara Reedy) biological grandchildren, and thus the only lawful "issue" of Mrs. Reedy's only natural child, Norma Colene Maddox. (*Infra,* Appendix A, 1a-2a). It should be noted that the issues as to whether Ms. Maddox was the natural child of Mrs. Reedy and whether Respondents are her natural grandchildren were confirmed in Respondents' favor by the Court of Appeal, which stated in part that "the finding was not challenged in the previous appeal. In the interests of bringing finality to these proceedings we are inclined to deem that issue to have been conclusively resolved in the earlier appeal." [Op. at App. 9, 19].

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* For the convenience of the Court, all citations to the Opinion will be to the Opinion attached as Appendix C to the Petition for Writ of Certiorari, unless otherwise specified.

1. Lawrence B. Mucklow died January 7, 1995, two days after filing the present appeal. California Code of Civil Procedure §§ 377.30, 377.32 and 337.33 allow an action to be continued by a decedent's personal representative only if a proper declaration is filed with the Probate Court and (Cont'd)

(Cont'd)
an Order granting such authority issues. Petitioner, a deceased person, lacks standing to continue this appeal and file this petition. His personal representative or successor in interest is unknown to this Court, has not been properly appointed in accordance with applicable California law, and lacks standing to continue this action or file this petition. California Rules of Court, Rule 48, states:

> (a) **[Parties]** Whenever a substitution of parties to a pending appeal is necessary, it shall be made by proper proceedings instituted for that purpose in the superior court. On suggestion thereof and the presentation of a certified copy of the order of substitution made by the superior court, a like order of substitution shall be made in the reviewing court.

Cal. Rules of Ct., Rule 48(a).

Petitioner's legal representative never complied with California law during the pendency of the appeal nor prior to filing the instant petition, thus lacking standing to file same. Lack of standing is jurisdictional and arguably invalidates the timely filing of this Petition for Writ of Certiorari within the 90-day limitation. Petitioner's citation to California Code of Civil Procedure § 669 is unavailing since the judgment has already been entered herein and § 368.5 requires a prior order from the court to allow an action to continue in the deceased's name. That was not accomplished here. Petitioner has no legal standing since Mr. Mucklow's executor did not obtain an order of the Los Angeles County Superior Court to pursue and continue this appeal. Therefore, the Petition for Writ of Certiorari, in and of itself, is invalid on its face for lack of a proper party appellant.

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APPENDIX

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Appendix B — Appeal Court's Transmittal Letter Pursuant to California Rules of Court, Rule 978(a) Upon Declining the Requests for Publication 3a

Respondents request the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the Court of Appeal of California, Fourth Appellate District, Division Two, which held that Respondents are "issue" of Edna Clara Reedy and are entitled to distribution, equally, of the entire estate of Mrs. Reedy under Probate Code § 6408 in effect on the date of her death, because the estate vested in them on the date of death, subject only to administration. After a court trial held April 11, 1994, the judgment was affirmed by the appellate court in an unpublished opinion.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). Most, if not all, of the questions presented for review in the petition were never presented to the California courts. These newly presented arguments may not properly be considered. *See* pp. 7-12 below. As shall be seen, there are no issues presented in the Petition which satisfy the statutory criteria of Supreme Court Rule 10.1(c)'s tenets.

CONSTITUTIONAL AND STATUTORY PROVISIONS OMITTED BY PETITIONER

The issues of first impression now raised by Petitioner have escalated to include the First Amendment's guaranty of redress of grievances and the Fourteenth Amendment's stanchions of "due process" and "equal protection." Since Petitioner failed to recite the precise sections of the California Probate Code upon which the trial court ruled, and upon which the Court of Appeal affirmed Respondents' rights of inheritance, Respondents hereby incorporate those provisions in their entirety, in addition to the

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* For convenience of the Court, the former appeal in *Estate of Reedy*, 18 C.A. 4th 769, 22 Cal. Rptr. 2d 478 (1993), will be cited herein as "*Reedy I*" and the present appeal as "*Reedy II*".

Tenth Amendment to the United States Constitution, relating to those rights reserved to the states of the union.

United States Constitution, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.

Statutory Provision Of California:

For the convenience of the Court, Respondents will refer to Petitioner's Appendix F at App. 35-37, which is a recitation of the California Rules of Court for Publication of Appellate Opinions, Rules 976-979.

California Probate Code Provisions Cited By The Court Of Appeal And Omitted By Petition From Its Petition:

The following sections of the California Probate Code are the penultimate sources of the crux of the Court of Appeal's decision (in addition to Probate Code § 6408(c) cited by Petitioner at Appendix to Petition for Writ of Certiorari, App. 4-5).

> Current California Probate Code — Preliminary Provisions and Definitions (enacted) 1990 ch. 79 14, operative July 1, 1991
>
> **§ 2. Construction.** (a) A provision of this code, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, shall be construed as a restatement and continuation thereof and not as a new enactment.

(b) A provision of this code, insofar as it is the same in substance as a provision of a uniform act, shall be so construed as to effectuate the general purpose to make uniform the law in those states which enact that provision.

3. Application of "New Law" and "Old Law.

(a) As used in this section:

(1) "New law" means either or the following, as the case may be:

(A) The act that enacted this code.

(B) The act that makes a change in this code, whether effectuated by amendment, addition, or repeal of any provision of this code.

(2) "Old law" means the applicable law in effect before the operative date of the new law.

(3) "Operative date means the operative date of the new law.

(b) This section governs the application of a new law except to the extent otherwise expressly provided in the new law.

(c) Subject to the limitations provided in this section, a new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or

circumstance existed before, on, or after the operative date, including, but not limited to, creation of a fiduciary relationship, death of a person, commencement of a proceeding, making of an order, or taking of an action.

* * *

(g) If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law.

(h) If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other persons in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section or the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference.

Current California Probate Code — Parent and Child Relationship (enacted) Stats. 1993 ch. 529, 1996 ch. 862

§ 6452. Child Born Out of Wedlock. If a child is born out of wedlock, neither a natural parent nor a relative of that parent, except

for a brother or sister of the child or the issue of that brother or sister, inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:

(a) The parent or a relative of the parent acknowledged the child.

(b) The parent or a relative of the parent contributed to the support or the care of the child.

Current California Probate Code - Passage of Decedent's Property (enacted) Stats. 1990 ch. 79 14, operative July 1, 1991. § 7000.

Title Passes to Devisee or Heirs. Subject to Section 7001, title to a decedent's property passes on the decedent's death to the person to whom it is devised in the decedent's last will or, in the absence of such a devise, to the decedent's heirs as prescribed in the laws governing intestate succession.

SUMMARY OF ARGUMENT

Petitioner seeks review in this Court on three "Questions Presented" (Petition at i) and five restated "Matters to be Reviewed" (Petition at 2). His petition should be denied outright inasmuch as the California Court of Appeal unequivocally neither decided any unsettled important question of federal law which should be settled by this Court nor decided a federal question which in any manner conflicts with applicable decisions of this Court. Supreme Court Rule 10.1(c).

(1) Petitioner contends the decision by the California Supreme Court to refrain from reviewing the appellate opinion was wrong, asserting a "separation of powers" conflict has arisen, *i.e.*, whether the legislative or judicial branch of California "had the last word" on intestate succession law, and whether or not to direct publication of the appellate opinion, thus violating due process and equal protection guarantees. A ruling in favor of Petitioner regarding publication would not alter the decision in this case. Petitioner is merely seeking an advisory opinion from this Court based on an undeveloped trial court record, and on issues not properly presented on appeal.

(2) Petitioner contends that the nonpublished opinion of the California Court of Appeal, Fourth District, Division Two, which decreed that "*the children of an adopted child are entitled to inherit from their biological grandmother*" is somehow now contradictory to statutory law and is, in some unidentifiable manner, affected by the Court of Appeal's decision not to publish its Opinion. Again, Petitioner is reaching for an advisory opinion from this Court based on a vacant trial court record, and on a "*non-issue*" never presented on appeal. This Court's precedent is well established requiring parties to raise issues first on appeal to avoid unnecessary adjudication in this Court by allowing state courts to resolve issues on state law grounds, and to assist this Court in its deliberations by promoting the creation of an adequate factual and legal record. *Banker Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Webb v. Webb*, 451 U.S. 493, 501 (1981).

(3) Petitioner similarly contends that the appellate court's decision not to certify its opinion for publication, which he claims "effectively immunized said opinion against review by the higher court", violates due process and equal protection. It is respectfully submitted that the California Supreme Court fully adjudicated Petitioner's Petition for Review and having weighed Petitioner's arguments, denied review. Petitioner again seeks an

advisory opinion from this Court based on an undeveloped trial court record, and on a further "*non-issue*" never presented on appeal. *Bankers Life & Casualty Co., supra,* at 79; *Webb, supra,* at 500.

(4) Petitioner contends that the California Supreme Court and the Court of Appeal rejected Petitioner's request for publication, and the resultant "nonpublication" of the Opinion results in a denial of his constitutionally guaranteed "equal protection" rights. There is absolutely no case law cited by Petitioner supporting this proposition, which is speculative at best and irrelevant at worst. This new issue ("*vacatur theory*") was never raised at trial or appellate level for adjudication, and Petitioner now seeks a determination of a non-issue on appeal.

(5) Lastly, Petitioner contends that California Rules of Court, Rules 976-979, which exact standards for publication of opinions, and gives the California Supreme Court the right to deny a party's request for publication of an opinion not certified for publication, violates his First Amendment right to petition the Government for redress of grievances. Once again, there is absolutely no case law cited by Petitioner for this claimed right, which is wholly speculative and irrelevant. Also, this new issue was never raised at the trial nor appellate level for adjudication, and Petitioner now seeks a determination of another "*non-issue*" on appeal as a matter of first impression.

STATEMENT OF THE CASE

The Court of Appeal's Opinion adequately sets forth the facts for purposes of this petition. Petitioner's recitation of the case in his petition for certiorari misstates and omits facts which are key to an understanding of the decision of the Court of Appeal.

Petitioner continues to revisit, and by *arguendo* denies, even

after the prior appellate determination (*Reedy I*), the established fact that Norma Collene (Mucklow) Maddox was the only natural living child of decedent, Edna Clara Reedy, who died intestate. It is undisputed that Norma was born out of wedlock and that her maiden name was "Edna Mucklow." On December 13, 1928, decedent gave Norma up for adoption, and Los Angeles Superior Court Judge Robert H. Scott signed the Decree of Adoption whereby Mr. and Mrs. Robert B. Smith adopted Norma, decedent's only child. Norma had three children living at the death of her natural mother, Edna Clara Reedy, whose names are Sherry E. Farrow Harvey, Thomas O. Farrow and James R. Farrow (Respondents). The court appointed Harvey administratrix of the estate of decedent after trial thereon. The court of appeal in *Reedy I* affirmed the trial court's ruling that Norma was Mrs. Reedy's only natural child and that Respondents were her natural grandchildren — hence, Letters of Administration issued to Ms. Harvey, issue of the deceased. The trial court found from a plethora of evidence that not only was Norma Mrs. Reedy's child, but that there was incontrovertible evidence that Norma was "acknowledged" by the decedent and that the decedent "contributed" to her support (Appendix A, *infra*, 1a-2a). That finding is independently determinative of Respondents' vested rights to inherit under Probate Code §§ 3(h), 6452 and 7000.

REASONS FOR DENYING THE WRIT

I.

PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT A FEDERAL QUESTION WHICH WAS EVER RAISED BY PETITIONER ON APPEAL AND THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S ARGUMENTS.

This Court wisely refuses to review judgments rendered by the highest court of a state unless a federal question has been

both raised and decided in the state court below. *Yee v. City of Escondido,* 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington,* 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935) (failure to follow appellate channels provided by state court is fatal). Petitioner has not met his burden of showing that the issue was properly presented to the Court of Appeal or California Supreme Court. When the highest state court is silent on a federal question presented to it, this Court has concluded that the issue was not properly presented. *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550 (1987). The aggrieved party bears the burden of defeating this assumption, as recently addressed by this Court in *Adams v. Robertson et al.,* No. 95-1873 (1997); *see also Webb, supra,* at 501.

California law is consistent with federal law: arguments not presented to the trial court cannot be presented in the court of appeals. California Rules of Court, Rule 13. Likewise, even if the appellate court agrees that error occurred, it cannot reverse the decision unless it also determines that the error prejudiced the outcome of the case. California Code of Civil Procedure, § 475; *People v. Watson,* 46 C.2d 818, 836 (1981). Regarding any alleged "errors", this Court of Appeal noted in its Opinion (Op. at App 16), that "(t)he earlier ruling of the probate court may have been incorrect, but neither this court nor the Supreme Court thought so."

In this Court, for the first time, Petitioner argues he has been denied his rights under the First Amendment to petition the government for "redress of grievances" and also under the "due process" and "equal protection" provisions of the Fourteenth Amendment, alleging now that such violations give

rise to a right to petition for certiorari. (Petition at 3-4, 6-12). Petitioner did not cite in briefing the First or Fourteenth Amendments to the Court of Appeal or to the California Supreme Court at any time prior to filing this Petition.

The trial court's and the Court of Appeal's decisions rest largely on "no evidence" findings of any due process or equal protection violations. A finding of no evidence by a state trial court, affirmed on appeal, presents no issue deserving this Court's attention. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *reh'g granted*, 337 U.S. 910 (1949), *adhered to in part, reversed in part*, 339 U.S. 605 (1950). ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error").

Respondents respectfully oppose the Petition for Writ of Certiorari, which for the most part, accomplishes nothing but selecting a forum to assail the integrity of the entire California judiciary for making alleged holdings never in fact made, on issues never in fact presented to the California courts, and attacks the entire statutory structure of the rights of the state court to publish or not to publish appellate decisions. Petitioner has thrust Respondents into the unenviable position of researching and briefing pristine and esoteric issues never raised on appeal and never ruled on by any California court in this appeal.

Petitioner further attacks the constitutionality of California Rules of Court, Rules 976-979, for the very first time in this appeal. Constitutionality of these Rules was never raised as an issue in Petitioner's Opening Brief, Request for Re-hearing, nor Petition for Review filed with the California Supreme Court. The Court of Appeal unanimously rendered its Opinion in favor of Respondents on September 10, 1996. The Opinion was admittedly designated "NOT FOR PUBLICATION." Attorney

Senter, Petitioner's appellate counsel and Norbert R. Bunt, Petitioner's probate attorney, sent letters to the Court of Appeal requesting the Opinion be certified for official publication. Attorney Hekman, representing Kirk (not joining in the present Petition for Writ of Certiorari) also sent the Court of Appeal a letter joining in Mr. Bunt's request. (*See* App. 23-28, Appendix to Petition for Writ of Certiorari.) Respondents' counsel, Attorneys Savord and Pinto, both sent letters to the appellate court objecting to publication thereof. (*See* App 29-34, Appendix to Petition for Writ of Certiorari.)

On October 3, 1996, the Hon. Manuel A. Ramirez, Presiding Justice of the Court of Appeal, wrote a letter to the Hon. Ronald M. George, Chief Justice of the California Supreme Court, transmitting the Opinion pursuant to Rule 978a, enclosing the letters of all counsel and concluding with the following rationale for non-publication on behalf of the Court of Appeal:

> It is not published because, in our view, the opinion does nothing but *restate settled legal principles.*

Emphasis added, *infra* at Appendix B, *infra* at 3a.

One need read no further in this brief to capsulate the entirety of Respondents' position as Justice Ramirez has done. To repeat, "the opinion does nothing further but restate settled legal principles." Petitioner's Petition for Review to the California Supreme Court was totally devoid of any reference or argument regarding the issues now thrust for the first time at this Court regarding the constitutionality of California Rules of Court, Rules 976-979. In fact, the Supreme Court denied that petition on December 18, 1996, having read and reviewed all arguments pro and con "publication" that had been transmitted to it by all counsel. The California Supreme Court concluded in its ruling:

> Petition for review DENIED. The requests for an order directing publication of the opinion are denied.

See App. 2, Appendix to Petitioner's Petition for Writ of Certiorari.

Thus, it must be concluded that Petitioner has had a full and fair opportunity to be heard on the issue of publication. Based upon the statutory and case law guidelines for publication, both the Court of Appeal and California Supreme Court rejected Petitioner's demands outright. Furthermore, it is irrelevant whether the Opinion was or was not published. Petitioner evidently assumes that he would have had a greater likelihood of reversal on appeal had the Opinion been published. That is pure speculation and second guessing at this stage of appeal. Petitioner had a full and fair hearing on the merits of all of his issues raised on appeal in the Court of Appeal, and the California Supreme Court fully reviewed the Court of Appeal's Opinion. Neither the ruling of the California Supreme Court nor the Court of Appeal would have changed nor resulted in a different outcome had the Opinion been published. There is not one scintilla of evidence proffered in support of Petitioner's contention that non-publication of the Opinion somehow infringed on his constitutional rights or raised a "Federal question" regarding the validity of the California Rules of Court relating to the publication or non-publication of opinions.

If one gives credence to Petitioner's argument that the fact of non-publication somehow transforms the effect of an appellate court ruling with such negativity that the ruling is not only rendered "wrong", but also unconstitutional, havoc would be created as to the implicatory effect arising from the fact that thousands of cases have been decertified or not published over the course of California's judicial history. Furthermore, neither the California Rules of Court nor case law create a stigma to a

decertification order, as in *Reedy I*. In fact, California Rules of Court, Rule 979(e) expressly states that depublication shall *not* be deemed an expression of opinion by the Supreme Court. *Mangini v. J.G. Durand Int.*, 31 Cal. App. 4th 214, 37 Cal. Rptr. 2d 153 (1994). Petitioner's virginal issue totally lacks any merit. Petitioner's attempt to allege violation of his constitutional rights is solely based on the fact that the Court of Appeal ruled against his position, and nothing else. Nothing will change that reality, whether the Opinion had or had not been published is an irrelevancy to these proceedings.

If this Court grants certiorari and rules that all appellate courts no longer have authority to publish or not to publish or decertify cases, such a consequence will have an incredibly widespread deleterious effect on the entire judicial system. This will result in courts being forced to interpolate retroactivity and precedential effect between current and former laws as the different opinions relate to one another. This will further require re-adjudication of every case decertified or not published, and would manifest severe confusion between the scope of the judicial and legislative branches of government. The door would be opened to a "thousand year flood" of re-litigation in every state, whereby former unsuccessful petitioners and appellants will demand re-trials and re-appeals of their cases, criminal and civil. The result Petitioner is seeking could trigger the creation of an entire body of rules and laws to process resulting litigation of cases not published or decertified for publication. The outcome Petitioner applies for would be disastrous to the California legal system of jurisprudence and violative of the Tenth Amendment to the United States Constitution guaranteeing such rights as are reserved to the states.

II.

THE MANDATE OF THE COURT "TO DO WHAT IS FAIR" HAS BEEN EFFECTED BY THE CALIFORNIA COURT OF APPEAL AND SUPREME COURT BY ENFORCING THE CORRECT VESTING PRINCIPLES CONTAINED IN CALIFORNIA'S INTESTATE SUCCESSION LAWS. THE DUE PROCESS, EQUAL PROTECTION AND REDRESS OF GRIEVANCE CHALLENGES RAISED HERE BY PETITIONER FOR THE FIRST TIME HAVE NO EFFECT ON THE JUDGMENT FOR RESPONDENTS.

The constitutional directive to "do what is fair" applies to the upholding of Respondents' rights in this appeal. Petitioner's latest issue regarding the application or non-application of the court's prerogative to abstain to publish is a "red-herring" issue manufactured for its heuristic value. The Court of Appeal properly used the "law of the case" doctrine and the California legislative intent as to the impact of passage of Probate Code § 7000 to formulate its finding that Respondents were the sole heirs of the decedent. Petitioner errantly attributes that court's and the California Supreme Court's actions in refusing to publish and denying review as the easy method to abstain from decisions regarding the viability and effectiveness of the 1994 legislative enactment at issue. Petitioner misses the point and misstates the entire thrust of the Opinion. The Court of Appeal squarely confronted the issue of applicability of the statutory implications of "change of law" versus "clarification of law" head on. Petitioner wrongly attributes the catch-word "abstention" to the Court of Appeal's Opinion, when in point of fact, just the opposite occurred.

In its Opinion (*see* Op. at App. 10), the court clearly focused on the "dispositive" issue of the entire case: "What law should be applied to the determination of heirship?" While Petitioner

does not like the result of the Court of Appeal's analyses and the California Supreme Court's denial of its petition for review, there is a substantial body of law and precedence cited by the Court of Appeal which rendered a full and "fair" examination of the retroactivity of the statutory scheme involving Probate Code § 6408(c). The Court of Appeal ruled that the trial court was correct in concluding that the law applicable to the facts of this case is the law in effect at the time of Mrs. Reedy's death in January, 1991, and affirmed the trial court's order.

It should be noted that the alleged "abstention" issue now contrived by Petitioner for the initial time, though never raised previously on appeal, created absolutely no "separation of powers" conflict of any type with the California legislature. This notion is a figment of Petitioner's creative mind. There was no "escape route," referred to by Petitioner, taken by the Court of Appeal to block further judicial review by declining not to certify the case for publication. Of utmost significance, is the undeniable fact that in *Reedy I*, the Court of Appeal held that Probate Code § 6408.5(b)'s (later renumbered 6408(c)) language in the parenthetical clause "except for the issue of the child" carved out an exception to the general rule that the relative of a parent of a child who has been adopted out cannot inherit from or through the adopted child. (Op. at App. 5, 6). Relying on that determination, the trial court granted Respondent Harvey letters of administration on the basis that she was the natural granddaughter of decedent and along with her two brothers (Respondents herein), fell within the exception set forth in then Probate Code § 6408.5(c) and was entitled to letters of administration. In *Reedy I,* the appellate court held that "the children of the adopted child are entitled to inherit from their biological grandmother." The Court of Appeal determined in *Reedy II* that "the question of distribution of the estate should be decided under the law that existed in 1991, *that is, the law under which our earlier decision was rendered*" (emphasis added) (Op. at App. 17).

Petitioner feigns that the legislative changes to the Probate Code effective January 1, 1994 were ignored by the trial court, the Court of Appeal and the California Supreme Court and that Petitioner did not get fair and impartial rulings based on the new law. This is patently false and all such contentions in the Petition (Petition at 14-20) are simply *arguendo*. As the Court of Appeal pointed out, in January 1994, Petitioner filed a motion in the Court of Appeal to recall the remittitur "in light of legislative changes to the Probate Code." (Op. at App. 6). The Court of Appeal examined those amendments, determined they were *not* a "*clarification*" but a "*change*" in the law, and denied the motion. Of primary significance is the fact that Petitioner failed to file a petition for writ of certiorari in *Reedy I* on the very same issues now before this Court regarding the effect of a change in the law on Respondents' vested rights. (Op. at App. 6, 16). By failing to do so, not only is Petitioner precluded from a subsequent "second" review of a matter which is "law of the case", but more importantly should not now be allowed argue transitory non-issues relating to constitutional right deprivation by nonpublication.

More significantly, the Court of Appeal in its Opinion (Op. at App. 14-17) dispensed with any issue of the application of a retrospective law, or whether such a law would have been constitutional by the following analyses. Probate Code § 7000's application to the facts of this case is determinative of its finding that Respondents were vested with the rights of inheritance on the law in effect on the date of death of Mrs. Reedy. Citing *Evangelatos v. Superior Court,* 44 Cal. 3d 1188, 1218 (1988) for the precedent that there is a "well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent" (Op. at 14), along with the fact that the trial court is given the discretion by Probate Code § 3(h) to apply the former law over the newly changed law (because an application of the new law would "substantial interfere" with the rights of the parties), the Court of Appeal concluded that

the intent of the legislature was to "respect the rights that were vested under the old law" (Op. at 15) in favor of Respondents.

In unequivocal terms, the Court of Appeal concluded that no constitutional issues were raised or needed determination since it decided that the California legislature did not intend that the new law should be applied in this action. (Op. at App. 14-16). Furthermore, none of Petitioner's challenges here of the court's alleged violations of the due process, equal protection or redress of grievances claims made by Petitioner, are relevant because the Court of Appeal did "not reach the question of whether a retrospective law would have been constitutional." (Op. at App. 16).

III.

CALIFORNIA RULES OF COURT, RULES 976-979 ARE NOT "INHERENTLY UNFAIR" NOR DO THEY CONSTITUTE AN ABRIDGEMENT OF CONSTITUTIONAL RIGHTS.

Most recently, in *Lawrence v. Chater*, 133 L. Ed. 2d 545, 116 S. Ct. 611 (1996), this Court reaffirmed its charter under 28 U.S.C. § 2106 authorizing broad powers to grant certiorari, vacate a judgment below and remand for further decision. Petitioner's attempt to find similarities between that case and the present one are unavailing since absolutely none of the criteria used by this Court to institute a "GVR" in *Lawrence, supra,* is present on a state level in the instant action.

This Court has held that GVR was only available where there existed (1) intervening or recent developments that the Supreme Court had reason to believe the court below did not fully consider or reveal a probability that the decision below rested upon a premise that the lower court would reject if given the opportunity for further consideration; and (2) it appears that

such a re-determination may determine the ultimate outcome of the litigation. None of these factors are remotely present in this appeal.

The appropriate use of GVR in the federal context claims a dependency on all the circumstances of the case and this Court in *Lawrence, supra*, recognized that its application would be inappropriate where (1) it appears that the intervening development (such as a litigant's confession of error in certain aspects of the judgment), is part of an unfair or manipulative litigation strategy, or (2) the delay and further cost entailed in remand are not justified by the potential benefits of further consideration by the lower court. It is transparently manifest that neither of these two conditions have been met here.

The intervening development of a change in California law (vis-a-vis § 6408(c) was changed on January 1, 1994, and replaced by § 6451) had no retroactive effect on vested rights of Respondents. (Op. at App. 16-19). There have been two costly appeals in this case over a five year span brought by Petitioners. The delays and costs of remand and re-decision are not only unsupported by case law and the applicable statutes (Probate Code §§ 6408(c), 7000 and 3(h)), but are inherently unfair to Respondents' interests in achieving finality to predetermined issues.

Returning briefly to *Lawrence, supra,* that court of appeals had adopted a rationale for rejecting a petitioner's claim that the constitutionality of state paternity laws need not be considered before applying it to determine entitlement to benefits under a federal statutory scheme. The key element prompting the majority of this Court to grant GVR was the fact that the Solicitor General advised that the "Social Security Administration had re-examined the role of state paternity and intestacy laws in the Federal benefits scheme" and now interpreted the Social Security Administration "as requiring a

determination at least in some circumstances, of whether the state intestacy statute is constitutional." None of the elements presented in *Lawrence, supra,* are *even remotely* evident here. Petitioner cites no admission of error of law to possibly infringe on Petitioner's constitutional rights to a full and fair hearing. The vesting of entitlement to intestate succession under the California statutory scheme falls squarely on Probate Code §§ 6408(c), 7000 and 3(h) as discussed below, none of which were found to effect anything other than "substantial justice" by the application of the law existing at the time of death of Mrs. Reedy to the facts of this action in Respondents' favor as her "issue."

The trial court in *Reedy II* made two separate findings after trial, either of which standing on its own merits is completely determinative of the finding of inheritance rights in favor of Respondents:

(a) that because Respondents were issue of Edna Clara Reedy, they are entitled to distribution of her entire estate, under Probate Code § 6408(c) in effect on her date of death, because that estate vested in them on date of death; and,

(b) that because Ms. Maddox was born out of wedlock to Mrs. Reedy, she was, after adoption out, acknowledged by Mrs. Reedy, who also contributed to the support of Ms. Maddox. Thus, if Probate Code § 6452 were to apply, Respondents would be entitled to inherit her entire estate.

What has occurred in the instant case is exactly what the legislature contemplated happening at the time the former relevant Probate Code sections were in effect, triggering the "exception provisions" of former Probate Code § 6408.5(b). Ms. Maddox's issue (her three children) inherited *through the child* (Ms. Maddox), though the requirements of 6408.5(c)(1) and (2) were not satisfied. The statutory scheme in force on the date of

Mrs. Reedy's passing dictates these requirements do not have to be met if, as here, the adopted child leaves issue surviving decedent. The Farrows are exempted from the general rule of non-inheritance by statutory exception, and thus are sole heirs of decedent.

Former Probate Code § 6408(a) stated the relationship of parent and child is established for the intent of determination of intestate succession (1) *except* as provided in § 6408.5. Mrs. Reedy was survived by a natural child born out of wedlock, later adopted, and three (3) grandchildren. The grandchildren, (Respondents), fall definitively into the legislative exception created in former Probate Code §§ 6408(c) and 6408.5(b). Based on those code sections alone, Mrs. Reedy's grandchildren are sole surviving heirs of decedent.

Former Probate Code § 6408(c) stated in pertinent part:

> (c) Neither a parent nor a relative of a parent *(except for the issue of the child or a wholeblood brother or sister of the child or the issue of that brother or sister)* inherits from or through a child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent.

Emphasis added.

Applying these principles, since the decedent was survived by a natural child and grandchildren, the Farrows were determined sole surviving heirs of the decedent. The decedent's child, Norma, born out of wedlock and then adopted, created the classic situation for which the statutory scheme was promulgated. There is not, and cannot be any other interpretation of these statutes. There existed no other legislative purpose for

the inclusion of these exceptions, and Petitioner's arguments to the contrary notwithstanding, Respondents are exempted from the general rule of non-inheritance by former Probate Code §§ 6408(c) and 6408.5(b).

The Court's attention is directed to the essential operative phrase in former Probate Code § 6408.5's first clause:

> *Notwithstanding* subdivisions (a) and (b) of Section 6408 . . .

(Emphasis added) wherein the legislature unequivocally created and carved out an exception to the preceding paragraphs of former Probate Code § 6408. Regarding the intent as to the 1985 amendments to Probate Code §§ 6408 and 6408.5, reference is made to *Recommendations Relating to the Effect of Adoption or Out of Wedlock Birth on Rights at Death,* 18 Cal. L. Rev. Comm. Rprts 289, 299-303 (1986) (20 Cal. L. Rev. Comm. Rprts 100 (1990)).

The interpretation tendered by Respondents has its basis as described in the Law Revision Commission comments: "In addition, subdivision (c) is amended to permit the issue of the child or a brother or a sister of the child or the issue of such brother or sister to inherit from or through the child even though the requirements of paragraphs (1) and (2) of such division (c) are not satisfied."

The trial court further buttressed the weight of its decision on the singularly relevant and dominating remaining sections of Probate Code § 3(h). That code section is *determinative* of the entire case in favor of Respondents, even if one were to challenge every prior decision of the state Supreme Court and Court of Appeal in *Reedy I* and the present action:

> 3(h). If a party shows, and the court determines, that application of a particular provision of the new law or of the old law in the manner required by this section or by the new law would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date, the court *may, notwithstanding this section of the new law, apply either the new law or the old law to the extent reasonably necessary to mitigate the substantial interference.*

Emphasis added.

In the instant case, there is no potential for any "unequal treatment" of Petitioner as occurred in *Lawrence, supra.* Here, the probate court unequivocally decided what law should apply to the determination of heirship, finding the Respondents were "*issue*" of Mrs. Reedy and should take as such "under Probate Code § 6408 in effect on the date of her death because that estate vested in them on the date of death, subject only to administration." (Op. at App. 8).

The California legislative scheme provides the probate court the inherent power to use its wise discretion in the exercise of its equitable powers to apply pre-existing law to the extent reasonably necessary to mitigate the "substantial interference" of the new law with the rights of the parties or other interested persons in connection with an event that occurred before the operative date of the new law. (Probate Code § 6452). This is not a case of intervening legislative developments leading to a reason to believe that the appellate court did not fully consider the case, or a reasonable probability that the decision below

rests upon a premise that the lower court would reject if given the opportunity for further consideration. There is no merit to Petitioner disguising his rejection of the Court of Appeal's decision in the present attack on the so-called "*vacatur*" laws, because they are not *relevant.*

Unlike the facts in *Lawrence, supra,* re-determination will not affect the ultimate outcome of the case, so application of the GVR option is not appropriate. This Court has previously recognized the wisdom of exercising GVR "sparingly." *Alvarado v. United States,* 497 U.S. 543, 545, 111 L. Ed. 2d 439, 110 S. Ct. 2995 (1990). In the present action, there is not the factual basis nor urgency as in *Lawrence, supra,* in *Tuggle v. Netherland,* 515 U.S.__, 132 L. Ed. 2d 918, 116 S. Ct. 38 (1995) or in the factual pattern of *Robinson v. Story,* 469 U.S. 1081, 83 L. Ed. 2d 694, 105 S. Ct. 583 (1984).

The fairness doctrine precludes improper extensions of limited power without first finding error in the Court of Appeal's Opinion below. It should be noted that the present case is not a situationwhere GVR has been extended to a judgment rendered by a lower federal or state court concerning a "federal question." *See Amer v. Superior Court of California, County of Los Angeles,* 334 U.S. 813, 92 L. Ed. 1744, 68 S. Ct. 1069 (1948) and *Exxon Corp. v. Youell,* 516 U.S. __, 133 L. Ed. 2d 9, 116 S. Ct. 43 (1995).

IV.

PETITIONER'S DENOMINATED "CALIFORNIA VACATUR" STATUTES ARE NOT INHERENTLY UNFAIR AND DO NOT CONSTITUTE ANY ABRIDGEMENT OF DUE PROCESS NOR EQUAL PROTECTION GUARANTEED BY THE CONSTITUTION.

Petitioner assails the fundamental rights guaranteed under the Tenth Amendment to the United States Constitution, which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.

Petitioner seeks to use the California Rules of Court, Rules 976-979, as a *sword* to advance his speculative argument that somehow, someway, the failure of a court of appeals to publish a decision, and the actions of the California Supreme Court to depublish or decertify an opinion, would have resulted in a different decision regarding his inheritance rights under the facts of this case. Petitioner next attempts to use the very same Rules of Court as a *shield* to seemingly insulate him from opinions of the Court of Appeal in *Reedy I* and the present case (in each instance, Petitions for Review were denied by the California Supreme Court).

A litigant cannot have it both ways. Petitioner basically seeks to emasculate the prerogative of the entire California appellate court system, and the enactments of the California legislature, by inferring that expediency in the judicial system precludes the right to a full and fair hearing. As noted by the trial court in this action, and cited by the Court of Appeal, in its Opinion (Op. at App. 10), at the hearing in this instant action to

determine the heirship rights of the parties, the court viewed the Court of Appeal's statement in its Opinion in *Reedy I*, that "(w)e decline to give the parties an advisory opinion on the other issues they raise, except to the note that the trial court should decide those issues under the law in effect at the time of its decision, as we will consider the correctness of the trial court's decision in any future appeal," as "dicta" and did not view itself as bound by the statement in any respect. This Court of Appeal had two responses to the prior appellate court's statement: (1) that "[a]t the time of the order denying the motion to recall the remittitur, the issue of which law should apply to determinations of heirship was not before this court"; and (2) "(a)nother possibility is that this court meant no more than that the trial court should apply the law that applies. Under that interpretation, the trial court determined that the 'law in effect at the time of its decision' was the law in effect at the time of Mrs. Reedy's death in January, 1991."

This colloquy precisely shows the ultimate dilemma that would be effected should this Court give credence to Petitioner's assertion that every single Court of Appeal's decision and every single state Supreme Court decision be published. The appellate justices know what they are doing by depublishing, decertifying or not publishing a given opinion. To accept Petitioner's rationale for a federal rule to mandate every state court of the United States to publish every opinion ever rendered would create a nightmarish confusion of prior and current case law, and stir up a witches' brew of correct and incorrect decisions, creating an impossibility of precedential law. In brief, it is only Petitioner's opinion (no one else's) that the present Opinion "eminently qualified for publication, on several grounds" (Pet. 17). Such totally speculative statements are wholly undermined by the reality that neither the Court of Appeal in *Reedy I* and *Reedy II* or the California Supreme Court in *Reedy I* and *Reedy II* agreed with Petitioner's conclusion.

Petitioner has had equal access to the courts of California, as have Respondents — twice over the last five years. The First and Fourteenth Amendments guarantee due process not only to Petitioner, but Respondents also, lest Petitioner forgets. Rather than second-guess the Court of Appeal's and the California Supreme Court's rationale and reasoning — as has been done with consistency throughout two appeals of the same intrinsically inbred issues, Petitioner should accept the present ruling at its face value rather than attempt an harangue against the entire judicial system because a decision was not reached in his favor.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

APPENDIX A — JUDGMENT DETERMINING PERSONS ENTITLED TO DISTRIBUTION OF ESTATE

IN THE SUPERIOR COURT OF THE

STATE OF CALIFORNIA FOR THE

COUNTY OF RIVERSIDE

SUPERIOR COURT
FILED
May 23, 1994

William H. Sullivan

JUDGE OF THE SUPERIOR COURT

Estate of:

EDNA CLARA REEDY,

Deceased.

This cause came on regularly for hearing on April 11, 1994 in Department 1 of the Riverside County Superior Court, the Honorable William H. Sullivan, judge presiding. Petitioners and Respondents Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow appeared by their attorneys, George Hugh Savord and Richard J. Pinto. Petitioners and Respondents Lawrence B. Mucklow et al. appeared by their attorney, Norman R. Bunt. Petitioner and Respondent Vivienne L. Kirk appeared by her attorney, Ralph K. Hekman.

All parties having filed pleadings for determination of persons entitled to distribution of the Estate of Edna Clara Reedy, including Petitions for Determination of Heirship, and/or Statements of Interest, and/or Affidavits of Heirship; and,

evidence, both oral and documentary, having been presented by the various parties, the cause having been argued and submitted for decision,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow are issue of Edna Clara Reedy, so that Probate Code Section 6402.5 does not apply, and are entitled to distribution, equally, of the entire estate of Edna Clara Reedy, under Probate Code Section 6408 in effect on her date of death, because that estate vested in them on the date of death, subject only to administration.

2. Norma Colleen Maddox was born out of wedlock to Edna Clara Reedy, and was, after her adoption out, acknowledged by Edna Clara Reedy, as her child; and Edna Clara Reedy, after said adoption, contributed to the support and care of Norma Colleen Maddox, so that Sherry E. Farrow Harvey, Thomas O. Farrow and James Farrow as relatives of Edna Clara Reedy, to-wit: grandchildren, would be entitled to inherit her estate through their mother, Norma Colleen Maddox, if Probate Code Section 6452 were to be followed.

DATED: MAY 23, 1994

WILLIAM H. SULLIVAN

JUDGE OF THE SUPERIOR COURT

APPENDIX B — APPEAL COURT'S TRANSMITTAL LETTER PURSUANT TO CALIFORNIA RULES OF COURT, RULE 978(a) UPON DECLINING THE REQUESTS FOR PUBLICATION

[seal]
COURT OF APPEAL

FOURTH APPELLATE DISTRICT, DIVISION TWO
303 WEST FIFTH STREET
SAN BERNARDINO, CALIFORNIA 92401

CHAMBERS OF
MANUEL A. RAMIREZ
PRESIDING JUSTICE

909-383-4443

October 3, 1996

The Honorable Ronald M. George
Chief Justice
California Supreme Court
303 Second St., South Tower
San Francisco, California 94107-1117

Re: Estate of Edna Clara Reedy, deceased
No. E014711, Superior Court No. P-61523

Dear Chief Justice George:

Pursuant to California Rules of Court, rule 978a, there is transmitted herewith a copy of our opinion in the above matter, together with all requests for its publication and all objections thereto.

It is not published because, in our view, the opinion does nothing but restate settled legal principles.

Appendix B

Respectfully Yours,

[signed]
Manuel A. Ramirez
Presiding Justice

MAR:mm
enclosures

[Notification List-omitted]